

1-1 By: Carona S.B. No. 848
 1-2 (In the Senate - Filed February 26, 2013; March 5, 2013,
 1-3 read first time and referred to Committee on Business and Commerce;
 1-4 March 21, 2013, reported adversely, with favorable Committee
 1-5 Substitute by the following vote: Yeas 9, Nays 0; March 21, 2013,
 1-6 sent to printer.)

1-7 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-8				
1-9	X			
1-10	X			
1-11	X			
1-12	X			
1-13	X			
1-14	X			
1-15	X			
1-16	X			
1-17	X			

1-18 COMMITTEE SUBSTITUTE FOR S.B. No. 848 By: Carona

1-19 A BILL TO BE ENTITLED
 1-20 AN ACT

1-21 relating to assignment of rents to holders of certain security
 1-22 interests in real property.

1-23 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-24 SECTION 1. Subdivisions (1), (3), (4), and (9), Section
 1-25 64.001, Property Code, as added by Chapter 636 (S.B. 889), Acts of
 1-26 the 82nd Legislature, Regular Session, 2011, are amended to read as
 1-27 follows:

1-28 (1) "Assignee" means a person entitled to enforce a
 1-29 security instrument ~~[an assignment of rents]~~.

1-30 (3) "Assignor" means a person ~~[an owner of real~~
 1-31 ~~property]~~ who makes a security instrument that creates an
 1-32 assignment of rents arising from real ~~[the]~~ property or that
 1-33 person's ~~[owner's]~~ successor in interest with respect to the real
 1-34 property.

1-35 (4) "Cash proceeds" means proceeds that are money,
 1-36 checks, deposit accounts, or the like ~~[similar legal tender]~~.

1-37 (9) "Rents" means ~~[+]~~
 1-38 ~~[(A)]~~ consideration payable for the right to
 1-39 possess or occupy, or for possessing or occupying, real property,
 1-40 [+]

1-41 ~~[(B)]~~ consideration payable to an assignor under
 1-42 a policy of rental interruption insurance covering real property,
 1-43 [+]

1-44 ~~[(C)]~~ claims arising out of a default in the
 1-45 payment of consideration payable for the right to possess or occupy
 1-46 real property, [+]

1-47 ~~[(D)]~~ consideration payable to terminate an
 1-48 agreement to possess or occupy real property, [+]

1-49 ~~[(E)]~~ consideration payable to an assignor for
 1-50 payment or reimbursement of expenses incurred in owning, operating,
 1-51 and maintaining, or constructing or installing improvements on,
 1-52 real property, [+] or

1-53 ~~[(F)]~~ any other consideration payable under an
 1-54 agreement relating to the real property that constitutes rents
 1-55 under a law of this state other than this chapter. The term does not
 1-56 include consideration payable under an oil and gas lease, mineral
 1-57 lease, or other conveyance of a mineral estate.

1-58 SECTION 2. Section 64.002, Property Code, as added by
 1-59 Chapter 636 (S.B. 889), Acts of the 82nd Legislature, Regular
 1-60 Session, 2011, is amended to read as follows:

2-1 Sec. 64.002. MANNER OF GIVING [~~PROVIDING~~] NOTICE. (a) A
2-2 person may give [~~provide a~~] notice under this chapter:

2-3 (1) by transmitting the notice in the manner described
2-4 by Section 51.002(e);

2-5 (2) by depositing the notice with the United States
2-6 Postal Service or a commercially reasonable delivery service,
2-7 properly addressed to the intended recipient's address in
2-8 accordance with this section, with first class postage or other
2-9 cost of delivery paid; or

2-10 (3) by transmitting the notice to the intended
2-11 recipient by any means agreed to by the intended recipient.

2-12 (b) The following rules determine the address for notices
2-13 under Subsection (a):

2-14 (1) the address for notices [~~Except as agreed under~~
2-15 ~~Subsection (a)(3), notice]~~ to an assignee is [~~must be sent to]~~ the
2-16 [~~assignee's~~] address of the assignee agreed [~~as provided]~~ in the
2-17 [~~relevant~~] security instrument or other [~~another~~] document between
2-18 the parties as the address for notices to [~~entered into for the~~
2-19 ~~purposes of this section by]~~ the assignee [~~and the person sending~~
2-20 ~~the notice]~~, unless a more recent address for notices [~~notice]~~ has
2-21 been given [~~in a manner provided by Subsection (a)]~~ by the assignee
2-22 to the person giving [~~sending~~] the notice in accordance with
2-23 Subsection (a) or as agreed in a security instrument or other
2-24 document signed by the assignee; [~~-]~~

2-25 (2) the address for notices [~~(c) Except as agreed~~
2-26 ~~under Subsection (a)(3), notice]~~ to an assignor is [~~must be sent to]~~
2-27 the [~~assignor's~~] address of the assignor agreed [~~as provided]~~ in
2-28 the [~~relevant~~] security instrument or other [~~another~~] document
2-29 between the parties as the address for notices to [~~entered into for~~
2-30 ~~the purposes of this section by]~~ the assignor or as provided in [~~and~~
2-31 ~~the person sending the notice or an address for the assignor to~~
2-32 ~~which a notice of default under]~~ Section 51.002 [~~is properly sent]~~,
2-33 unless a more recent address for notices [~~notice]~~ has been given [~~in~~
2-34 ~~a manner provided by Subsection (a)]~~ by the assignor to the person
2-35 giving [~~sending~~] the notice in accordance with Subsection (a) or as
2-36 agreed in a security instrument or other document signed by the
2-37 assignor; and [~~-]~~

2-38 (3) for notices [~~(d) Except as agreed under~~
2-39 ~~Subsection (a)(3), notice]~~ to a tenant [~~must be sent to]~~:

2-40 (A) if there is [~~(1)]~~ an address for notices
2-41 [~~notice]~~ to the tenant [~~provided]~~ in a signed document between
2-42 [~~entered into by]~~ the tenant and the person giving [~~providing~~] the
2-43 notice, the person giving the notice shall use that address unless a
2-44 more recent address for notices [~~notice]~~ has been given by the
2-45 tenant in accordance with that document;

2-46 (B) [~~(2)]~~ if an address for notices [~~notice]~~
2-47 described by Paragraph (A) [~~Subdivision (1)]~~ does not exist, but
2-48 the tenant's [~~the address provided in a written]~~ agreement with
2-49 [~~between the tenant and]~~ the assignor has an address for notices to
2-50 the tenant and [~~if]~~ the person giving [~~sending~~] the notice has
2-51 received a copy of that document [~~agreement]~~ or has actual
2-52 knowledge of the address for notices [~~notice]~~ specified in that
2-53 document, the person giving the notice shall use that address
2-54 [~~agreement]~~; or

2-55 (C) [~~(3)]~~ if an address for notices [~~notice]~~
2-56 described by Paragraphs (A) and (B) [~~Subdivision (1) or (2)]~~ does
2-57 not exist, the person giving the notice shall use the tenant's
2-58 address at the real property covered by the security instrument.

2-59 (c) [~~(e)]~~ Notice given [~~provided]~~ in accordance with this
2-60 chapter [~~section]~~ is deemed [~~considered]~~ received on the earliest
2-61 of:

2-62 (1) the date the notice is received by the person to
2-63 whom the notice is given [~~provided]~~;

2-64 (2) the fifth day after the date the notice is given
2-65 [~~provided]~~ in accordance with Subsection (a)(2); or

2-66 (3) the date on which notice is deemed received
2-67 [~~considered provided]~~ in accordance with an agreement made by the
2-68 person to whom the notice is given [~~provided for the purposes of~~
2-69 ~~this section]~~.

3-1 (d) A notice under this chapter must be a document.
3-2 SECTION 3. Subsections (a) and (b), Section 64.051,
3-3 Property Code, are amended to read as follows:

3-4 (a) An enforceable security instrument creates an
3-5 assignment of rents arising from real property described in that
3-6 ~~[securing an obligation under the]~~ security instrument, unless the
3-7 security instrument provides otherwise or the security instrument
3-8 is governed by Section 50(a)(6), (7), or (8), Article XVI, Texas
3-9 Constitution.

3-10 (b) An assignment of rents creates a presently effective
3-11 security interest in all accrued and unaccrued rents arising from
3-12 the real property described in the security instrument ~~[document]~~
3-13 creating the assignment, regardless of whether the security
3-14 instrument ~~[document]~~ is in the form of an absolute assignment, an
3-15 absolute assignment conditioned on default or other ~~[another]~~
3-16 event, an assignment as additional security, or any other
3-17 form. The security interest in rents is separate and distinct from
3-18 any security interest held by the assignee in the real property from
3-19 which the rents arise.

3-20 SECTION 4. Subsections (a), (b), and (d), Section 64.052,
3-21 Property Code, are amended to read as follows:

3-22 (a) A security instrument ~~[document]~~ creating an assignment
3-23 of rents may be recorded in the county in which any part of the real
3-24 property is located in accordance with this code.

3-25 (b) On recordation of a security instrument ~~[document]~~
3-26 creating an assignment of rents, the security interest in the rents
3-27 is perfected. This subsection prevails over a conflicting
3-28 provision in the security instrument ~~[document]~~ creating the
3-29 assignment of rents or a law of this state other than this chapter
3-30 that prohibits or defers enforcement of the security interest until
3-31 the occurrence of a subsequent event, including ~~[such as]~~ a
3-32 subsequent default of the assignor, the assignee's obtaining
3-33 possession of the real property, or the appointment of a receiver.

3-34 (d) An assignee with ~~[of]~~ a perfected security interest in
3-35 rents has the same priority over the rights of a person described by
3-36 Subsection (c) with respect to future advances as the assignee has
3-37 with respect to the assignee's security interest in the real
3-38 property from which the rents arise.

3-39 SECTION 5. Section 64.053, Property Code, is amended to
3-40 read as follows:

3-41 Sec. 64.053. ENFORCEMENT OF SECURITY INTEREST IN RENTS
3-42 GENERALLY. (a) An assignee may enforce an assignment of rents
3-43 using one or more of the methods provided by Section 64.054 or
3-44 64.055 or any other ~~[another]~~ method sufficient to enforce an ~~[the]~~
3-45 assignment of rents under a law of this state other than this
3-46 chapter.

3-47 (b) On and after the date on which an assignee begins to
3-48 enforce an assignment of rents, the assignee is entitled to collect
3-49 all rents that:

- 3-50 (1) have accrued ~~[before]~~ but remain unpaid on that
3-51 date; and
- 3-52 (2) accrue on or after that date.

3-53 SECTION 6. Subsections (a) and (b), Section 64.054,
3-54 Property Code, as added by Chapter 636 (S.B. 889), Acts of the 82nd
3-55 Legislature, Regular Session, 2011, are amended to read as follows:

3-56 (a) After default, or as otherwise agreed by the assignor,
3-57 the assignee may give ~~[provide]~~ the assignor a notice demanding
3-58 that the assignor pay the assignee the proceeds of any rents that
3-59 the assignee is entitled to collect under Section 64.053.

3-60 (b) For the purposes of Section 64.053, the assignee begins
3-61 enforcement under this section on the date on which the assignee
3-62 gives ~~[provides]~~ notice to the assignor in accordance with Section
3-63 64.002.

3-64 SECTION 7. Subsections (a), (c), (d), and (e), Section
3-65 64.055, Property Code, are amended to read as follows:

3-66 (a) After default, or as otherwise agreed by the assignor,
3-67 the assignee may give ~~[provide]~~ to a tenant of real property that is
3-68 subject to an assignment of rents a notice demanding that the tenant
3-69 pay to the assignee all unpaid accrued rents and all unaccrued rents

4-1 as they accrue. The assignee shall give [~~provide~~] a copy of the
4-2 notice to the assignor in accordance with [~~the manner provided by~~]
4-3 Section 64.002. The notice must substantially comply with the form
4-4 prescribed by Section 64.056 and be signed by the assignee or the
4-5 assignee's authorized agent or representative.

4-6 (c) Subject to Subsection (d) and any other claim or defense
4-7 that a tenant has under a law of this state other than this chapter,
4-8 after a tenant receives a notice under Subsection (a):

4-9 (1) the tenant is obligated to pay to the assignee all
4-10 unpaid accrued rents and all unaccrued rents as they accrue, unless
4-11 the tenant has previously received a notice under this section from
4-12 another assignee of rents given [~~provided~~] by that assignee in
4-13 accordance with this section and the other assignee has not
4-14 canceled that notice;

4-15 (2) except as otherwise agreed in [~~provided by~~] a
4-16 document signed by the tenant, the tenant is not obligated to pay to
4-17 an assignee rent that was prepaid to the assignor before the tenant
4-18 received the notice under Subsection (a);

4-19 (3) unless the tenant occupies the premises as the
4-20 tenant's primary residence, the tenant is not discharged from the
4-21 obligation to pay rents to the assignee if the tenant pays rents to
4-22 the assignor;

4-23 (4) the tenant's payment to the assignee of rents then
4-24 due satisfies the tenant's obligation under the tenant's agreement
4-25 with the assignor to the extent of the payment made; and

4-26 (5) the tenant's obligation to pay rents to the
4-27 assignee continues until the earliest date on which the tenant
4-28 receives:

4-29 (A) a court order directing the tenant to pay the
4-30 rents in a different manner;

4-31 (B) a signed notice that a perfected security
4-32 instrument that has priority over the assignee's security interest
4-33 has been foreclosed; or

4-34 (C) a signed document from the assignee canceling
4-35 the assignee's notice.

4-36 (d) Except as otherwise agreed in [~~provided by~~] a document
4-37 signed by the tenant, a tenant who has received a notice under
4-38 Subsection (a) is not in default for nonpayment of rents that accrue
4-39 during the 30 days after the date the tenant receives the notice
4-40 until the earlier of:

4-41 (1) the 10th day after the date the next regularly
4-42 scheduled rental payment would be due; or

4-43 (2) the 30th day after the date the tenant receives the
4-44 notice.

4-45 (e) On receiving a notice from another assignee [~~creditor~~]
4-46 who has priority under Section 64.052(c) that the assignee
4-47 [~~creditor~~] with priority has conducted a foreclosure sale of the
4-48 real property from which the rents arise or is enforcing the
4-49 [~~creditor's~~] interest in rents of the assignee with priority by
4-50 notice to the tenant, an assignee that has given [~~provided~~] a notice
4-51 to a tenant under Subsection (a) shall immediately give [~~provide~~]
4-52 another notice to the tenant canceling the earlier notice.

4-53 SECTION 8. Section 64.058, Property Code, is amended to
4-54 read as follows:

4-55 Sec. 64.058. APPLICATION OF PROCEEDS GENERALLY. Unless
4-56 otherwise agreed [~~by the assignor~~], an assignee who collects rents
4-57 under this chapter or collects on a judgment in an action under
4-58 Section 64.060 shall apply the sums collected in the following
4-59 order to:

4-60 (1) reimbursement of the assignee's expenses of
4-61 enforcing the assignee's assignment of rents, including, to the
4-62 extent provided for by agreement by the assignor and not prohibited
4-63 by a law of this state other than this chapter, reasonable
4-64 attorney's fees and costs incurred by the assignee;

4-65 (2) reimbursement of any expenses incurred by the
4-66 assignee to protect or maintain the real property that is subject to
4-67 the assignment of rents [~~if the assignee elects or is required to~~
4-68 ~~apply the proceeds to those expenses under Section 64.059~~];

4-69 (3) payment of the secured obligation;

5-1 (4) payment of any obligation secured by a subordinate
 5-2 security interest or other lien on the rents if, before
 5-3 distribution of the proceeds, the assignee receives a signed notice
 5-4 from the holder of the interest or lien demanding payment of the
 5-5 proceeds; and

5-6 (5) payment of any excess proceeds to the assignor.

5-7 SECTION 9. Subsection (b), Section 64.059, Property Code,
 5-8 is amended to read as follows:

5-9 (b) Unless otherwise agreed by a tenant, the right of the
 5-10 assignee to collect rents from the tenant is subject to the terms of
 5-11 any agreement between the assignor and tenant or ~~and~~ any claim or
 5-12 defense of the tenant arising from the assignor's nonperformance of
 5-13 that agreement.

5-14 SECTION 10. Subsections (a) and (d), Section 64.060,
 5-15 Property Code, are amended to read as follows:

5-16 (a) If an assignor collects rents that the assignee is
 5-17 entitled to collect under this chapter, the assignor shall turn
 5-18 over the proceeds to the assignee not later than the 30th day after
 5-19 the date the assignor receives notice from the assignee under
 5-20 Section 64.054 or within such other ~~another~~ period agreed
 5-21 ~~prescribed~~ by the assignor and assignee in a security instrument
 5-22 ~~or other document [signed by the assignor and approved by the~~
 5-23 ~~assignee]~~, less any amount representing payment of expenses agreed
 5-24 in that [authorized by a] security instrument or other document
 5-25 ~~signed by the assignee~~.

5-26 (d) Unless otherwise agreed, if [by] an assignee who [that]
 5-27 has a security interest in rents that is subordinate to the security
 5-28 interest of another assignee [priority] under Section 64.052
 5-29 enforces the [a] subordinate assignee's [creditor that has
 5-30 enforced the subordinate creditor's] interest under Section 64.054
 5-31 or 64.055 before the [priority] assignee with [enforces the]
 5-32 priority enforces the [assignee's] interests in rents of the
 5-33 assignee with priority, the subordinate assignee is not obligated
 5-34 to turn over any proceeds that the subordinate assignee [creditor]
 5-35 collects before the subordinate assignee [creditor] receives a
 5-36 signed notice from the [priority] assignee with priority informing
 5-37 the subordinate assignee [creditor] that the [priority] assignee
 5-38 with priority is enforcing the [priority assignee's] interest in
 5-39 rents of the assignee with priority. The subordinate assignee
 5-40 [creditor] shall turn over to the [a priority] assignee with
 5-41 priority any proceeds that the subordinate assignee [creditor]
 5-42 collects after the subordinate assignee [creditor] receives the
 5-43 notice from the [priority] assignee with priority that the
 5-44 [priority] assignee with priority is enforcing the [priority
 5-45 assignee's] interest in rents of the assignee with priority not
 5-46 later than the 30th day after the date the subordinate assignee
 5-47 [creditor] receives the notice or as otherwise agreed between the
 5-48 [priority] assignee with priority and the subordinate assignee
 5-49 [creditor]. Any proceeds subsequently collected by the subordinate
 5-50 assignee [creditor] shall be turned over to the [priority] assignee
 5-51 with priority not later than the 10th day after the date the
 5-52 proceeds are collected or as otherwise agreed between the
 5-53 [priority] assignee with priority and the subordinate assignee
 5-54 [creditor].

5-55 SECTION 11. The legislature finds that Subsection (c),
 5-56 Section 64.051, Property Code, as added by Chapter 636 (Senate Bill
 5-57 No. 889), Acts of the 82nd Legislature, Regular Session, 2011, was
 5-58 intended by the 82nd Legislature to eliminate confusion arising
 5-59 from language in the Texas Supreme Court's decision in Taylor v.
 5-60 Brennan, 621 S.W.2d 592 (Tex. 1981), to the effect that an absolute
 5-61 assignment of rents is a pro tanto payment of a secured obligation.
 5-62 In accordance with Subsection (c), Section 64.051, Property Code,
 5-63 as added by Chapter 636 (Senate Bill No. 889), Acts of the 82nd
 5-64 Legislature, Regular Session, 2011, unless the parties expressly
 5-65 agree otherwise, a secured obligation is reduced only if and to the
 5-66 extent that the assignee collects rents and applies the rents to the
 5-67 obligation. Simply taking an assignment of rents does not reduce
 5-68 the secured obligation.

5-69 SECTION 12. (a) Except as otherwise provided by this

6-1 section, Chapter 64, Property Code, as added by Chapter 636 (Senate
6-2 Bill No. 889), Acts of the 82nd Legislature, Regular Session, 2011,
6-3 and amended by this Act, governs the enforcement of an assignment of
6-4 rents, the perfection and priority of a security interest in rents,
6-5 and the attachment and perfection of a security interest in
6-6 proceeds regardless of whether the document creating the assignment
6-7 of rents was signed and delivered before the effective date of this
6-8 Act or before June 17, 2011.

6-9 (b) Chapter 64, Property Code, as added by Chapter 636
6-10 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular
6-11 Session, 2011, and amended by this Act, does not affect an action or
6-12 other proceeding commenced before June 17, 2011.

6-13 (c) Subsection (a), Section 64.051, Property Code, as added
6-14 by Chapter 636 (Senate Bill No. 889), Acts of the 82nd Legislature,
6-15 Regular Session, 2011, and amended by this Act, does not apply to a
6-16 security instrument signed and delivered before June 17, 2011.

6-17 (d) Chapter 64, Property Code, as added by Chapter 636
6-18 (Senate Bill No. 889), Acts of the 82nd Legislature, Regular
6-19 Session, 2011, and amended by this Act, does not affect:

6-20 (1) the enforceability of an assignee's security
6-21 interest in rents or proceeds if, immediately before June 17, 2011,
6-22 that security interest was enforceable;

6-23 (2) the perfection of an assignee's security interest
6-24 in rents or proceeds if, immediately before June 17, 2011, that
6-25 security interest was perfected; or

6-26 (3) the priority of an assignee's security interest in
6-27 rents or proceeds with respect to the interest of another person if,
6-28 immediately before June 17, 2011, the interest of the other person
6-29 was enforceable and perfected and that priority was established.

6-30 SECTION 13. This Act takes effect immediately if it
6-31 receives a vote of two-thirds of all the members elected to each
6-32 house, as provided by Section 39, Article III, Texas Constitution.
6-33 If this Act does not receive the vote necessary for immediate
6-34 effect, this Act takes effect September 1, 2013.

6-35

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